BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

DAYTON LUMMIS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-120
Case No. 71-7074

S.S.A. No.

The claimant appealed from Referee's Decision No. LA-7562 which held that the claimant had not earned sufficient wages to qualify for an award and that he therefore was ineligible to receive unemployment insurance benefits by reason of his claim filed effective January 31, 1971.

STATEMENT OF FACTS

By reason of the above claim the Department issued to the claimant a notice of computation that he did not qualify for unemployment insurance in that he had only earned $96.16 in the base period of the claim July 1, 1969 through June 30, 1970. The claimant requested that the computation be reconsidered and that credit be given to him for base period wages earned from Hollywood-Continental Films for the quarter ended December 31, 1969 in the amount of $5,169.88.

The claimant is an actor and a resident of the State of California; Hollywood-Continental Films is a California corporation maintaining offices in Hollywood, California. On or about October 1, 1969 the claimant was employed by Hollywood-Continental Films and signed a contract to work as an actor, in a production to be filmed in Arizona, at the rate of $850 per week, together with other allowances and expenses. His pay began approximately October 7, 1969 and ended December 1, 1969. Approximately two weeks before the

contract was signed the claimant received a script and spent some time studying the same on an unpaid basis. For one week after the contract was signed the claimant remained in California studying the script and obtaining a wardrobe in preparation for the shooting of the film.

On or about October 15 the claimant traveled to a location outside the City of Tucson, Arizona, where the motion picture entitled "MOONFIRE" was being shot by Hollywood-Continental Films. The claimant remained in the Arizona location until December 1, 1969. He did not at any time during that period return to California. All of his services from October 15 to December 1 were performed for the employer in Arizona.

The claimant received no instructions from California while he was on location. Any communications he had with the employer were with respect to the payment of a check or checks issued to his agent. All instructions were received from persons in Arizona on location. After the completion of the rendition of services on December 1, 1969, the claimant returned to California and performed no other services for the employer during the quarter in question.

The employer reported the claimant's wages to California and paid the taxes thereon.

On August 21, 1970 the Department, through its Auditing Section, issued a ruling with respect to the employer, which ruling stated in pertinent part:

> "Our auditor's report shows that the firm is in the motion picture production business and has been registered and filing returns of wages for its employees since June 1969. In the fourth quarter of 1969 it filmed a motion picture with the title 'Moonfire' on location in Arizona. You reported all of the cast and production crew to California.

"Since most of the crew and actors were hired to work exclusively in the picture and were terminated when the picture was completed and the major part of their services was performed in Arizona, it is our ruling that their services were localized in Arizona and therefore not reportable to California."

The issue to be decided is whether the claimant had sufficient base period wages to establish a valid claim for unemployment insurance benefits against the State of California.

REASONS FOR DECISION

The resolution of the issue raised rests upon a determination of whether the services of the claimant, performed both within and without the State of California are employment taxable by California under the multi-state principles hereinafter discussed.

Sections 601, 602 and 603 of the California Unemployment Insurance Code provide:

"601. 'Employment,' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

* * *

"602. 'Employment' includes an individual's entire service, performed within, or both within and without, this State if:

"(a) The service is localized in this State; or

"(b) The service is not localized in any state but some of the service is performed in this State and (1) the base of

operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

"603. Service is localized within a state if:

"(a) The service is performed entirely within the state; or

"(b) The service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; for example, is temporary or transitory in nature, or consists of isolated transactions."

Section 602 of the code contains a uniform definition of employment adopted by all states in respect to services performed within or both within and without a state. These uniform provisions have the objective of avoiding conflicts and overlapping coverage between states with respect to the multi-state services of an individual for a single employer.

This section of the code provides for the application of four parts to determine whether or not the employee's services are in employment subject to the law of this state. These tests are applied in the order indicated:

(1) Localization of services
(2) Base of operations
(3) Place of direction and control
(4) Residence

If the localization test applies, the remaining three tests are not applicable. However, if the services are not localized in any state, then the

second test, the base of operations, is applied. If neither of the first two tests are met, the third test, the place from which the services are directed and controlled, is used. Finally, if none of the first three tests are met, the residence test is used. The application of any of the tests must result in the consolidation of the reporting of the employee's wages in one state or that test is not applicable. For example, if the base of operations or the place of direction and control moves from state to state, these tests cannot be used. Some services must be performed in a state before these four tests can be applied to allocate all of the services to that state.

If the application of the proper test to an employee's services allocates all of the employment of such individual to a state other than California, none of his employment with the employer involved would be taxable by California, even though such services are held not taxable by the other states. (Tax Decision Nos. 1546 and 2367)

In view of the general principles set forth above, we must consider the first and principal test of whether or not the services performed by the claimant herein were localized in California or in Arizona. To be localized in California, any service performed by the claimant outside California would have to be incidental to the service which he performed within this state, as for example, where the out-of-state service was temporary or transient in nature or consisted of isolated transactions. Where the service performed outside of the state was either pemanent, substantial or unrelated, it cannot be treated as localized here. Claim of Mallia (1949), 299 N.Y. 232, 86 N.E. 2d 577, 9 A.L.R. 2d 636

Black's Law Dictionary, Fourth Edition, 1951, defines the word "incidental" as depending upon or appertaining to something else as primary; something necessary, appertaining or depending upon another, which is termed the principal; something incidental to the main purpose. The California courts have generally adopted this definition. (169 Cal. App. 2d, 810; 183 Cal. App. 2d 780, 786)

In the instant case the claimant performed two weeks of unpaid service and one week of paid service in California in preparation for the shooting assignment. The services performed in California, although part and parcel of the total service performed, nevertheless were incidental to the primary or principal service to be performed by the claimant in Arizona, namely, that of an actor on location in Arizona. Under the above applicable principles and law, we hold that the claimant's services were localized in Arizona. Being so localized, the entire services were not taxable under the California law and the claimant was not entitled to have the wages earned from Hollywood-Continental Films included in the base period of his claim.

Section 1281(a) of the code provides as follows:

> "An individual cannot establish a valid claim or a benefit year during which any benefits are payable unless he has during his base period been paid wages for employment by employers of not less than seven hundred twenty dollars ($720)."

Since the wages earned in the last quarter of 1969 in Arizona may not be included in the base period of his claim, the claimant has not earned sufficient wages to qualify for an award under section 1281(a) of the code.

We are not unmindful that the Arizona laws contain provisions identical to those set forth in sections 601, 602 and 603 of the California Code. (Arizona Revised Statutes Section 23-615, Title 23, Ch. 4) We are also aware that Section 23-613 of the Arizona Revised Statutes, Title 23, supra, defines "employer" as one which in each of 20 different calendar weeks, whether or not the weeks are or were consecutive, had in employment three or more individuals, irrespective of whether the same individuals were employed each day.

From the record before us it appears that Hollywood-Continental Films does not meet the definition of "employer" in the State of Arizona and that it is not

subject to wage contributions in that State. California could not assume jurisdiction for the payment of unemployment contribution benefits to the claimant with respect to his earnings in California and/or Arizona, simply because the employer was not subject to wage contributions under the laws of the State of Arizona. (Tax Decision No. 2367) This situation apparently, and unfortunately, results in a "gap" in the law with respect to the entitlement of benefits for an individual who has otherwise complied with the eligibility requirements of a particular state, but who nevertheless is being denied benefits. This, however, is a matter for the respective states or the federal government to rectify. As an administrative tribunal, we are bound to accept the law as written. If any inequities result from the application of a clearly written statute, recourse must be had to the legislature rather than to this board.

DECISION

The decision of the referee is affirmed. The claimant has insufficient base period wages to establish a valid claim for unemployment insurance benefits effective January 31, 1971.

Sacramento, California, December 2, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

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